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REPORT OF THE WORKING GROUP ON INTERNATIONAL PAYMENTS ON THE WORK OF ITS TWENTY-THIRD SESSION (New York, 3-10 September 1991)

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INTRODUCTION

1. The Commission, at its nineteenth session (1986), in the context of its discussion of a note by the Secretariat entitled "Future work in the area of the new international economic order" (A/CN.9/277), considered the topic of countertrade. There was considerable support in the Commission for undertaking work on the topic, and the Secretariat was requested to prepare a preliminary study on the subject. 1/

2. At its twenty-first session (1988), the Commission had before it a report entitled "Preliminary study of legal issues in international countertrade" (A/CN.9/302). The Commission made a preliminary decision that it would be desirable to prepare a legal guide on drawing up countertrade contracts. In order for the Commission to decide what further action might be taken, the Commission requested the Secretariat to prepare for the twenty-second session of the Commission a draft outline of such a legal guide. (See A/43/17, paras. 32-35.)

3. At its twenty-second session (1989), the Commission considered the report entitled "Draft outline of the possible content and structure of a legal guide on drawing up international countertrade contracts" (A/CN.9/322). It was decided that such a legal guide should be prepared by the Commission, and the Secretariat was requested to prepare for the next session of the Commission draft chapters of the legal guide. (See A/44/17, paras. 245-249.)

4. At its twenty-third session (1990), the Commission considered the following materials prepared by the Secretariat: a proposed structure of the legal guide (A/CN.9/332, para. 6); an outline of the introductory chapter to the legal guide (A/CN.9/332/Add.1); draft chapter II, "Scope and terminology of legal guide" (A/CN.9/332/Add.1); draft chapter III, "Contracting approach" (A/CN.9/332/Add.2); draft chapter IV, "General remarks on drafting" (A/CN.9/332/Add.3); draft chapter V, "Type, quality and quantity of goods" (A/CN.9/332/Add.4); draft chapter VI, "Pricing of goods" (A/CN.9/332/Add.5); draft chapter IX, "Payment" (A/CN.9/332/Add.6); and draft chapter XII, "Security for performance" (A/CN.9/332/Add.7). Draft chapter VII, "Fulfilment of countertrade commitment" (A/CN.9/332/Add.8), was submitted to but not considered by the Commission. A summary of the discussion in the Commission on the draft chapters (A/CN.9/332/Add.1-7) is contained in annex I to the report of the Commission on the work of its twenty-third session (A/45/17).

5. There was general agreement in the Commission with the overall approach taken in preparing the draft chapters, both as to the structure of the legal guide and as to the nature of the description and advice contained therein (A/45/17, para. 16). The Commission decided that the remaining draft chapters, which it requested the Secretariat to prepare, should be submitted, together with draft chapter VII, "Fulfilment of countertrade commitment" (A/CN.9/332/Add.8), to the Working Group on International Payments. The

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1/ Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), para. 243.

Commission also requested the Secretariat to redraft the chapters considered by it at its twenty-third session and the chapters to be submitted to the Working Group on International Payments in the light of the discussion at those sessions. The Commission decided that the final text of the legal guide should be submitted to its twenty-fifth session, to be held in 1992. (See A/45/17, paras. 17 and 18.)

6. The Working Group on International Payments commenced its work on the draft legal guide at its twenty-third session held at United Nations Headquarters in New York from 3 to 10 September 1991. The Group was composed of all States members of the Commission. The session was attended by representatives of the following States members: Bulgaria, Canada, Chile, China, Cuba, Cyprus, Czechoslovakia, Egypt, France, Germany, India, Iran (Islamic Republic of), Iraq, Italy, Japan, Kenya, Libyan Arab Jamahiriya, Mexico, Morocco, Pakistan, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Yugoslavia.

7. The session was attended by observers of the following States: Austria, Bahamas, Brazil, Burkina Faso, Indonesia, Lebanon, Malaysia, Oman, Poland, Sweden, Switzerland, Syrian Arab Republic, Uganda, United Republic of Tanzania and Venezuela.

8. The session was attended by observers from the following international organizations:

(a) United Nations organization: Centre on Transnational Corporations;

(b) Intergovernmental organizations: Asian-African Legal Consultative Committee, Inter-American Development Bank, Preferential Trade Area for Eastern and Southern African States;

(c) International non-governmental organizations: Argentine-Uruguayan Institute of Commercial Law, International Bar Association, International Chamber of Commerce.

9. The Working Group elected the following officers:

Chairman: Mr. Joachim Bonell (Italy)

Rapporteur: Mr. Abbas Safarian (Islamic Republic of Iran)

10. The following documents were submitted to the session:

(a) Provisional agenda (A/CN.9/WG.IV/WP.50);

(b) Draft legal guide on drawing up contracts in international countertrade transactions (A/CN.9/WG.IV/WP.51), report of the Secretary-General;

(c) Draft chapter VII, "Fulfilment of countertrade commitment" (A/CN.9/332/Add.8), which was originally submitted to the Commission and which the Commission referred to the Working Group;

(d) Draft chapter VIII, "Participation of third parties" (A/CN.9/WG.IV/WP.51/Add.1);

(e) Draft chapter X, "Restrictions on resale of goods" (A/CN.9/WG.IV/WP.51/Add.2);

(f) Draft chapter XI, "Liquidated damages and penalty clauses" (A/CN.9/WG.IV/WP.51/Add.3*);

(g) Draft chapter XIII, "Failure to complete countertrade transaction" (A/CN.9/WG.IV/WP.51/Add.4);

(h) Draft chapter XIV, "Choice of law" (A/CN.9/WG.IV/WP.51/Add.5);

(i) Draft chapter XV, "Settlement of disputes" (A/CN.9/WG.IV/WP.51/Add.6);

(j) Draft illustrative provisions (A/CN.9/WG.IV/WP.51/Add.7*).

11. The following documents considered by the Commission at its twenty-third session in 1990 were made available at the session:

(a) Draft legal guide on drawing up contracts in international countertrade transactions (A/CN.9/332), report of the Secretary-General;

(b) Outline of chapter I, "Introduction to legal guide", and draft chapter II, "Scope and terminology of legal guide" (A/CN.9/332/Add.1);

(c) Draft chapter III, "Contracting approach" (A/CN.9/332/Add.2);

(d) Draft chapter IV, "General remarks on drafting" (A/CN.9/332/Add.3);

(e) Draft chapter V, "Type, quality and quantity of goods" (A/CN.9/332/Add.4);

(f) Draft chapter VI, "Pricing of goods" (A/CN.9/332/Add.5);

(g) Draft chapter IX, "Payment" (A/CN.9/332/Add.6);

(h) Draft chapter XII, "Security for performance" (A/CN.9/332/Add.7);

(i) Report of the United Nations Commission on International Trade Law on the work of its twenty-third session, New York, 25 June - 6 July 1990 (A/45/17).

I. DELIBERATIONS AND DECISIONS

12. The Working Group considered draft chapters VII, "Fulfilment of countertrade commitment"; VIII, "Participation of third parties"; X, "Restrictions on resale of goods"; XI, "Liquidated damages and penalty clauses"; XIII, "Failure to complete countertrade transaction"; XIV, "Choice of law"; and XV, "Settlement of disputes", as well as draft illustrative provisions. The report of the deliberations and decisions of the Working Group is set forth below.

13. The Working Group requested the Secretariat to revise the draft chapters and illustrative provisions in the light of its deliberations and decisions and to present them to the Commission at its twenty-fifth session.

II. CONSIDERATION OF DRAFT CHAPTERS OF LEGAL GUIDE ON INTERNATIONAL COUNTERTRADE

General discussion

14. The Working Group considered whether it would be desirable to shorten the present title of the draft legal guide. In favour of retaining the present title it was stated that the title accurately reflected the contents of the legal guide and that it would be in line with the type of title used for the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works. Difficulties cited with the present title, aside from the impracticality of its length, included that the reference to "drawing up contracts" might not be a precise enough formulation in view of the fact that the legal guide did not focus on contracts that were involved in a countertrade transaction but on the countertrade agreement, which raised issues specific to countertrade. The prevailing view was that a shorter title, along the lines of "Legal Guide on International Countertrade Transactions", was preferable because it was more practical and adequately conveyed the subject-matter of the legal guide.

15. It was agreed that, in order to facilitate use of the legal guide, chapter summaries should be included at the beginning of each chapter and that a subject-matter index should be drawn up.

16. The observation was made that the use of the term "supplier" to refer to a party supplying goods on either side of a countertrade transaction might not by precise enough in all cases. The Secretariat was requested to review the use of that term in view of that observation.

17. The view was expressed that the legal guide should contain some reference to insurance aspects of countertrade transactions and should devote more attention to financing issues. It was agreed that references to insurance and financing aspects should be incorporated in the existing chapters of the legal guide.

VII. FULFILMENT OF COUNTERTRADE COMMITMENT (A/CN.9/332/Add.8)

A. General remarks

18. No changes were suggested to section A of draft chapter VII.

B. Defining eligible supply contracts

19. The view was expressed that the techniques of identifying eligible supply contracts by geographical origin (paragraph 6) and by identity of the supplier (paragraph 7) might conflict with rules adopted pursuant to the General Agreement on Tariffs and Trade and with mandatory rules of competition law. It was agreed that the paragraphs in question should refer to the need for provisions dealing with eligibility to be consistent with such rules of law.

C. Stage when commitment fulfilled

20. The Working Group noted that two approaches were presented with respect to the point of time at which fulfilment of the countertrade commitment might be deemed fulfilled. It was generally felt that the second approach, under which fulfilment would be deemed to be achieved upon the occurrence of some event after the conclusion of a supply contract, was more complicated and fraught with risk for the parties than the first approach, under which fulfilment would be deemed to be achieved simply upon the conclusion of a supply contract. It was pointed out, as an example of this greater complexity, that the second approach might result in uncertainty when exempting impediments affected the ability of a party to take the steps necessary in the performance of a supply contract to achieve fulfilment of the countertrade agreement. It was further suggested that the use of the second approach would necessitate additional provisions specifically dealing with such possible implications. The Working Group agreed that the legal guide should warn parties about the greater complexity of the second approach and, because of that complexity, advise parties to opt for the first approach.

D. Amount of fulfilment credit

21. A question was raised as to whether the intended import of paragraph 14 was that the technique of variable rates of fulfilment credit was used predominantly in indirect offset transactions. In that connection, the view was expressed that the inclusion of such a provision in the countertrade agreement would be of limited relevance in a bilateral countertrade transaction since, in such a transaction, the parties to a supply contract, being the same parties as the parties to the countertrade agreement, could alter in a supply contract any provisions on fulfilment credit set forth in the countertrade agreement. It was stated in response that, while such a variable rate technique was more likely to be used in a multi-party, offset transaction in which there were a number of potential suppliers and types of goods, such a technique might also be used in a two-party transaction. It was agreed that this should be made clear in paragraph 14.

E. Time period for fulfilment of countertrade commitment

22. The Working Group recognized the need for the legal guide to refer to situations in which, due to a variety of circumstances, it may be necessary to agree to extend the fulfilment period stipulated in the countertrade agreement. However, a number of concerns were expressed as to the precise formulation used in draft chapter VII, in particular with regard to the reference in paragraph 25 to demonstration of "good faith efforts" as a prerequisite to obtaining an extension.

23. One concern was that the inclusion of the reference to "good faith efforts" raised questions as to the nature of the countertrade commitment envisaged in the legal guide. It was suggested that the use of such an expression might suggest that the legal guide was addressing countertrade commitments involving only a commitment to expend "best efforts" to conclude a supply contract, rather than a commitment to actually conclude a supply contract. In response to that concern, it was pointed out that at issue in paragraph 25 was an extension of the fulfilment period and not a release from the countertrade commitment on the ground that "best efforts" expended to fulfil the commitment had been unavailing.

24. Another concern was that the term "best efforts" was ambiguous and likely to lead to disputes. A suggestion for dealing with that concern was that the reference to a requirement of demonstrating good faith efforts should be deleted in its entirety since the extension of the fulfilment period could be regarded as essentially a matter to be left to be negotiated by the parties. In response to that view, it was stated that a certain degree of ambiguity was inherent in transactions of the type in question and that therefore the term did not have to be modified. It was also pointed out that removal of the mention of good faith efforts might suggest that a party that had not made any effort to fulfil the countertrade commitment should nevertheless be entitled to claim an extension. Another suggestion for dealing with the ambiguity involved in the current formulation was to replace the term "good faith efforts" by the term "reasonable efforts". However, it was not generally felt that the use of that term would substantially diminish the problem of ambiguity.

25. Misgivings were also expressed as to the example of demonstrating good faith efforts contained in the third sentence of paragraph 25, namely, the showing of a "certain number of contacts" with potential suppliers in search of suitable countertrade goods. It was suggested that the term "contacts" was not sufficiently precise, particularly since the example was intended to refer to situations in which suppliers rejected or were unable to satisfy offers to purchase countertrade goods. It was further stated that under the general contract law of a number of legal systems, the mere showing of "contacts" would not be sufficient to excuse delay in fulfilment of a contractual obligation.

26. Another difficulty cited with respect to the example was that the expression "a certain number of contacts" might be read as suggesting that the countertrade agreement should specify a number of unsuccessful contacts that would have to be shown in order to obtain an extension. It was suggested that such advice would be unduly rigid and might not take account of differing circumstances encountered in different transactions. Parties following it might encounter difficulties when, for example, the number of potential suppliers was fewer than the number of unsuccessful contacts required for an extension.

27. After deliberation, the Working Group agreed to retain the basic approach taken with regard to extension of the fulfilment period. However, it was also agreed that the chapter should make it clear that demonstration of efforts to fulfil the countertrade commitment, be those efforts called "good faith" or "reasonable", raised practical difficulties of proof and that clearer reference should be made to the role of negotiation in such extensions. It was further agreed that the example in the third sentence should be modified to address the concerns that had been raised by the Working Group and to make clear that parties contemplating inclusion of a provision on extension would have to find appropriate language to fit the particular circumstances of each transaction.

F. Monitoring and recording fulfilment of countertrade commitment

28. A question was raised as to the import of the use of the term "shipments of goods" in paragraph 38 to describe the type of information to be recorded

in an evidence account. It was pointed out that the use of that term might create uncertainty in view of the earlier discussion of the different possible points of time, such as the conclusion of a supply contract or some event in the performance of the supply contract, at which the countertrade commitment might be deemed to be fulfilled (see para. 20 above). In that light, the use of the term "shipment of goods" might be read as excluding the recording of the conclusion of supply contracts in an evidence account. The Working Group noted that the term had been intended to be read in a general sense, and not in relation to the point of time at which fulfilment was to be deemed achieved. The Secretariat was requested to select a more precise formulation.

29. It was proposed that the mention in paragraph 43 of the possibility that the parties might agree to the periodic verification of information entered into evidence accounts should be transformed into a recommendation to that effect. In support of that proposal it was stated that the earliest possible verification of information was a crucial element in the successful operation of an evidence account. The Working Group agreed that verification of information was useful, irrespective of the particular structure or administration of the account.

VIII. PARTICIPATION OF THIRD PARTIES (A/CN.9/WG.IV/WP.51/Add.1)

A. General remarks; B. Purchase of countertrade goods

30. The Working Group was agreed that in sections A and B a clearer distinction should be made between the cases in which the involvement of a third party required consent by the supplier and cases in which the involvement of a third party did not require such consent. It was pointed out that, according to general principles of contract law, a contract party was entitled to involve a third party in the performance of a contractual obligation without having to obtain the consent of the party entitled to the performance. Consent, however, was required under those general principles if, in the circumstances of the case, the party entitled to the performance had a legitimate reason to insist that the obligation should be performed by the party originally committed. Such a legitimate reason might exist in particular when, because of special properties or capabilities of the obligated party, the performance of the obligation by a third party would in some way diminish the value of the performance. It was also pointed out that according to the principles of contract law consent by the party entitled to the performance was required when the party originally committed ceased to be responsible for the fulfilment of the contractual obligation as a result of a transfer or assignment of the contractual obligation to a third party.

31. The Working Group noted that the involvement of third parties in the fulfilment of a countertrade commitment was in some legal systems governed by mandatory rules. Such rules might make the participation of third parties subject to consent by the supplier of the goods, or subject to approval by an authority, even if according to the general principles of contract law consent by the supplier would not have been necessary.

32. It was agreed that the legal guide should discuss the position of the parties to the countertrade agreement in the situation in which the countertrade agreement did not address the possible participation of a third party in the fulfilment of the countertrade commitment. It was also agreed

that the legal guide should advise the parties to address the possible participation of a third party, in particular when the parties might have differing expectations as to whether the party originally committed was free to involve a third party of its choice in the fulfilment of the countertrade commitment.

33. It was suggested that paragraph 5 should make it clear that, while the third party's agreement with the supplier to enter into a future contract might address the same types of issues as were addressed in the countertrade agreement between the supplier and the party originally committed, the content of the contractual solutions in the two agreements would not necessarily be the same. Different solutions might be adopted, for example, as to security for performance, liquidated damages or a penalty, the applicable law or the settlement of disputes.

34. As to paragraph 9, it was suggested that mention should be made of the desire to ensure proper implementation of the countertrade transaction as a frequent reason for mandatory rules referred to in that paragraph.

35. It was suggested to replace, in the third sentence of paragraph 12, the expression "It is advisable to indicate" by another expression such as "The parties may indicate".

36. As to the advice given in paragraph 17, it was noted that when the party originally committed assigned the countertrade commitment to the third party, the third party would be responsible to the supplier under the same terms as the party originally committed.

37. With respect to the discussion of the third party's fee (paragraphs 28 to 32), it was noted that when a governmental agency was engaging a third party to purchase goods or when a governmental agency was being engaged to purchase goods, in some legal systems such a governmental agency might not be free to pay a fee to the third party or to receive a fee. Payment of fees by or to governmental agencies for such a purpose might be subject to mandatory restrictions and it was considered appropriate to draw the attention of the parties to the existence of such restrictions.

C. Supply of countertrade goods

38. No changes were suggested to section C.

D. Multi-party countertrade

39. It was observed that, in the event of a failure to conclude or to perform one of the supply contracts in a multi-party countertrade transaction, the whole countertrade transaction might be affected. The Working Group was agreed that section D should discuss briefly the question of interdependence between contracts forming part of the transaction.

X. RESTRICTIONS ON RESALE OF COUNTERTRADE GOODS (A/CN.9/WG.IV/WP.51/Add.2)

A. General remarks

40. It was agreed that mention should be made in the general remarks of the possibility of including in the countertrade agreement restrictions on the

supplier of goods that would protect the purchaser's ability to resell the countertrade goods or would otherwise make the countertrade transaction more profitable for the purchaser. For example, a purchaser of goods in a countertrade transaction might be given exclusive distributorship rights with respect to those goods, and the countertrade agreement in such a case would include clauses restricting sales by the supplier that might infringe on the purchaser's exclusive rights. While it was recognized that such restrictions on the supplier would be less relevant to the many countertrade transactions that were of a one-off nature, it was also recognized that there might be transactions involving trade-mark goods in which restrictions on the supplier would be relevant.

41. A view was expressed that paragraph 3 should be broadened to refer to judicial decisions as a source of interpretation of rules governing restrictive business practices.

42. A proposal was made to delete paragraph 4 on the ground that the economic effect of imposing resale restrictions was a purely economic matter beyond the scope of the legal guide. In favour of retaining paragraph 4, it was stated that its retention would cause no harm and would provide a useful glimpse at the economic context of countertrade. It was suggested that, for readers without extensive experience in countertrade, guidance of the type provided in paragraph 4 and other portions of the legal guide referring to economic considerations and consequences would be particularly useful and would help to make the legal guide less abstract. It was further suggested that there was no apparent reason for deleting paragraph 4 while retaining other portions of the guide that touched on economic considerations. However, it was suggested that a basis might be found for distinguishing paragraph 4 from such other references in the legal guide on the ground that, unlike those other portions of the legal guide, which referred to economic reasons for a particular contractual provision, paragraph 4 dealt with the economic effects of a contractual provision. After deliberation, the Working Group decided to retain paragraph 4, but at the same time to include a somewhat less categoric warning as to the possible economic implications of resale restrictions.

43. It was agreed that paragraph 5 should be modified to state that, where third-party purchases were subject to a resale restriction, it was advisable for the supplier to ensure that a third-party purchaser was aware that its purchases would be subject to the restriction.

B. Duty to inform or consult

44. No changes were suggested to section B.

C. Territorial and related restrictions

45. No changes were suggested to section C.

D. Resale price

46. No changes were suggested to section D.

E. Packaging and marking

47. It was generally felt that additional information should be provided concerning the statement in the first sentence of paragraph 21 concerning

compliance with the law applicable in the place of resale. In particular, it was suggested that mention should be made of mandatory rules requiring origin marking, prohibitions against clandestine modification of marking and packaging, and requirements derived from consumer protection and environmental law.

F. Application to third-party purchasers

48. No changes were suggested to section F.

G. Review of restrictions

49. It was agreed that paragraph 24 should be modified so as to make it clear that, even in the absence of a contractual provision concerning review of resale restrictions in the event of major changes in the underlying circumstances, under some legal systems a review would be available in such circumstances. It was stated that such a change would be in line with other references in the legal guide to applicable law and would remove the unintended implication that, without a contractual provision on review, no review would be available.

XI. LIQUIDATED DAMAGES AND PENALTY CLAUSES (A/CN.9/WG.IV/WP.51/Add.3*)

A. General remarks

50. It was suggested that the general remarks should allude to the fact that the discussion in chapter XI was not directly relevant to countertrade transactions such as barter in which goods were exchanged without the transfer of currency. Such an approach was said to have the advantage of recognizing that in countertrade transactions carried out in the context of cash shortages the parties would be more likely to agree on non-monetary means for dealing with the risk and effects of non-performance.

51. It was observed that there might be an apparent inconsistency between paragraph 2, which limited the scope of the chapter to clauses supporting fulfilment of countertrade commitment and excluded clauses supporting performance of supply contracts, and paragraph 3, which indicated that, in cases in which the countertrade commitment was deemed fulfilled only upon the performance of the supply contract, the obligation to pay an agreed sum for non-fulfilment of the countertrade commitment would be triggered by a failure to perform the supply contract. One suggestion for alleviating the inconsistency was the deletion of the second sentence of paragraph 2. The Secretariat was requested to review paragraphs 2 and 3 in light of the observations that had been made.

52. A view was expressed that there was duplication between chapter XI and paragraphs 10 to 13 of chapter XIII, which addressed monetary compensation in the case of breaches of contractual obligations and also mentioned liquidated damages and clauses. It was suggested that such duplication might cause confusion, and all discussion of liquidated damages and penalties should therefore be centered in chapter XI, with only a cross reference to chapter XI remaining in chapter XIII.

53. It was noted that payment under liquidated damages or penalty clauses was often through guarantees required to be posted to support the payment

obligation. In that regard, it was pointed out that, when liquidated damages or penalty clauses were supported by first-demand independent guarantees, there was a risk of unjustified drawing under the guarantee. One method for dealing with that risk that was suggested was to link liability under the liquidated damages or penalty clause to the dispute-settlement provisions in the countertrade agreement. For example, it might be agreed that payment of the agreed sum would be due only upon an arbitral decision, which would be supported by an accessory rather than an independent guarantee. The utility of discussing arrangements involving accessory guarantees was considered in the light of their limited use in countertrade and in the light of the focus of chapter XII on independent guarantees. The Working Group decided that the general remarks should allude to the use of guarantees to support liquidated damages and penalty clauses and that mention should be made in the chapter of the fact that there were alternatives to independent guarantees, without advocating the use of accessory guarantees. It was felt that the addition of language to that effect, with a cross-reference to chapter XII, would be in line with the general agreement in the Working Group that the legal guide should focus on independent guarantees.

54. It was suggested that the third sentence of paragraph 7 needed to be reformulated since in its current form it might suggest that there was a positive rule in the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) on release from the obligation to pay the agreed sum in the event of an exempting impediment. (Hereafter, this Convention will be referred to as the United Nations Sales Convention.)

55. Reference was made to the need to draw a clearer distinction between the discussion in paragraph 8 of clauses providing alternative obligations, which could result in release from the countertrade commitment, and the discussion in paragraph 12 of the effect of payment under liquidated damages or penalty clauses, which also could result in release from the countertrade commitment. The distinction that drew particular attention was that under clauses providing for alternative obligations it was the obligated party who had the option of either performing or paying the agreed sum, while under liquidated damages or penalty clauses it was the party to whom the performance was owed that had the option.

56. It was suggested that the general remarks should draw the attention of the reader to the distinction between liquidated damages or penalty clauses covering non-fulfilment of the countertrade commitment and clauses covering delay in fulfilment.

57. A view was expressed that liquidated damages or penalties were only one method among a variety of methods in dealing with non-fulfilment of countertrade agreements and that the legal guide should not recommend the use of liquidated damages and penalty clauses.

B. Relationship of recovery of agreed sum to recovery of damages

58. No changes were suggested to section B.

C. Effect of payment

59. A concern was expressed that paragraph 12 appeared not to take adequate account of the fact that under the applicable law the effect of payment of the

agreed sum might vary, depending in particular on whether the transaction involved only goods, or services or technology, or some combination, and whether any services could only be provided by the obligated party. It was also pointed out that there might be cases in which the liquidated damages or penalty clause did not cover the entire countertrade commitment. To address the concern as to services, it was agreed to add language to the effect that performance of an obligation to provide services might be unenforceable in some jurisdictions and might therefore have to be covered by damages.

D. Amount of agreed sum

60. The Working Group noted that the main focus of chapter XI was on liquidated damages and penalty clauses for non-fulfilment of the countertrade commitment, rather than for delay and that that focus reflected the predominance in countertrade of liquidated damages and penalty clauses for non-fulfilment. At the same time, the view was expressed that it was not clear which type of clause paragraphs 15 to 18 concerned. In that regard, the reference in paragraph 18 to the extent of the risk that the countertrade commitment would remain unfulfilled as a factor in determining the sum was said to be unclear.

61. A question was raised as to the need to retain the last sentence of paragraph 15, concerning the reduction of the guarantee amount to track reductions in the liquidated damages or penalty amount. In support of deletion of the sentence, it was stated that in some legal systems such a reduction in the guarantee amount would be automatic. It was pointed out, however, that, while such reductions might be taken for granted in the case of accessory guarantees, independent guarantees of the type that were the focus of the legal guide could not be considered to reduce automatically. The Working Group agreed that it would be useful to recall to the reader that the last sentence assumed the use of an independent guarantee and that a reference to accessory guarantees for the purpose of clarity would not run counter to the approach taken in paragraph 5 of chapter XII (see also para. 53 above).

62. It was agreed that paragraph 17 should be aligned with paragraph 6 by replacing the words "is likely to be viewed" by the words "might be viewed", and by inserting, after the words "the parties should bear in mind that", the words "in some legal systems".

E. Obtaining agreed sum

63. It was observed that the use of the term "deduction" in paragraph 22 appeared to be intended to cover both deduction from available funds and setoff. It was generally felt that a distinction had to be drawn between those two techniques. It was suggested that attention should be drawn to the existence of legal rules covering their use. One such rule found in a number of legal systems was that a setoff was possible only if the claims to be set off arose from the commercial relationship between the parties.

XIII. FAILURE TO COMPLETE COUNTERTRADE TRANSACTION (A/CN.9/WG.IV/WP.51/Add.4)

A. General remarks

64. The Working Group considered that chapter XIII should, in order to clarify the scope of the discussion of chapter XIII, mention the types of

countertrade commitments to which the chapter referred. At the same time, it was felt that it would be useful to refer briefly also to countertrade agreements that did not constitute a firm commitment to conclude a supply contract and that fell outside the scope of the chapter. The Working Group recalled that the Commission decided at its twenty-third session, in discussing draft chapter III (Contracting approach), that the legal guide should focus on countertrade agreements involving a firm countertrade commitment and that the legal guide should not address itself to countertrade agreements containing a lower degree of commitment (e.g., a commitment merely to negotiate or to exercise "best efforts" to conclude a supply contract) (see A/45/17, annex I, paras. 9 and 24).

B. Release from part or all of countertrade commitment

65. It was suggested to include in the enumeration of the cases in which a party might be released from the countertrade commitment the case mentioned in the last sentence of paragraph 19 of draft chapter XI (Liquidated damages and penalty clauses).

66. The Working Group considered that a party might be released from the countertrade commitment in the circumstances discussed in paragraph 6 even if no clause to that effect had been included in the countertrade agreement. That should be made clear in paragraph 6 so as to avoid giving the wrong impression that, for a party to be released from the countertrade commitment, a specific contractual provision was necessary.

67. Suggestions were made that the recommendation in paragraph 13 for the parties to agree on liquidated damages or a penalty was too strong since the advisability of the decision to include a liquidated damages or penalty clause in a countertrade agreement depended on a number of commercial circumstances. The description in draft chapter XI of the advisability of agreeing on liquidated damages or a penalty was considered more appropriate (see also para. 57 above).

C. Monetary compensation

68. It was observed that the question of monetary compensation in barter contracts gave rise to particular considerations arising from the fact such contracts did not involve a commitment to enter into a future contract and that the purpose of using barter might be to avoid transfers of currency. The Working Group noted that its discussion of that question in the context of chapter XI (Liquidated damages and penalty clauses) (see para. 50 above) should be taken into account in chapter XIII. (See also para. 52 above.)

D. Exempting impediments

69. The Working Group basically agreed with the discussion in paragraph 16 of the freedom of the parties to allocate by agreement the risk that a particular type of event impeding fulfilment of the countertrade commitment might occur. It was, however, considered necessary to mention in paragraph 16 that in some legal systems there were mandatory limits to the freedom of a party to waive its right to rely on legal rules on exempting impediments.

70. The Working Group discussed the question of the inability of a party to carry out a countertrade commitment as a result of a refusal by a State organ to grant the required licence. Under one view it was appropriate to advise

the parties, as it was done in paragraph 35 of draft chapter XIII, to agree in the countertrade agreement that the party who had a duty to obtain a licence should bear the consequences of the absence of the licence. Such advice was appropriate in view of the possibility that a party might be able to avoid a contractual obligation by not taking all the steps necessary to obtain the licence, and that it might be difficult for the aggrieved party to establish whether the licence was refused despite reasonable efforts to obtain it. The prevailing view, however, was that the discussion in paragraph 35 should differentiate between various situations. On the one hand, there were the situations where the refusal of the licence was due to insufficient efforts by the party who had to obtain the licence or to reasons relating to the particular transaction. On the other hand, there were the situations where the Government imposed a licence requirement after the conclusion of the countertrade agreement or where the licence was refused because of a supervening change in the general policy of the Government. In those latter situations it would not be equitable to place the risk on the party who had to obtain the licence but was unable to do so despite good faith efforts.

71. It was noted that if the event impeding the fulfilment of the commitment met the requirements of the applicable law (such as that the event was unforeseeable and unavoidable) the parties would be released from the commitment even if they had not included an exemption clause in the countertrade agreement. It was agreed to make that clear in section D, in particular in paragraph 22.

72. It was considered that the discussion of elements of a general definition of exempting impediments in paragraph 22 should refer to article 79 of the United Nations Sales Convention.

73. With respect to paragraph 26, it was observed that, when an exhaustive list of impediments was combined by a definition of criteria which the impediments must meet in order to be regarded as exempting impediments, the definition should not be termed as general. The Working Group noted that the discussion of the various methods of defining exempting impediments was modelled on the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works and that it was desirable not to depart from the structure of that Legal Guide, but that it might be appropriate to review the language of paragraph 26, and possibly also paragraph 27, in light of the observation.

74. It was observed that the contractual provision suggested in the last sentence of paragraph 32 regarding strikes and similar labour actions was controversial and was likely to cause disagreements in its application. Reference was made to a national legal system in which the interpretation of a rule similar to the one mentioned in the last sentence of paragraph 32 gave rise to difficulties. It was pointed out that it might be difficult to establish whether a strike arose from labour relations between the party and its employees or whether the reasons for the strike concerned a group of companies or the whole industrial sector. The Working Group agreed that the advice given in the last sentence of paragraph 32 should be deleted.

75. It was observed that the obligation to mitigate losses, which was discussed in paragraphs 36 and 37, obtained under the general principles of contract law, even if the parties had not agreed on an obligation to give a written notice of the impediment. The Working Group agreed that a reference

to those general principles of contract law should be the starting point for the discussion in paragraphs 36 and 37.

E. Effect on countertrade transaction of failure to conclude or perform supply contract

76. It was suggested to mention in section E, and possibly also elsewhere in chapter XIII, negotiations as an alternative to termination of a supply contract or of a countertrade commitment.

XIV. CHOICE OF LAW (A/CN.9/WG.IV/WP.51/Add.5)

A. General remarks

77. The Working Group agreed with the approach taken in the draft chapter, advising parties to address the question of the law applicable to the various component contracts of the countertrade transaction. It was noted favourably that the draft chapter did not advise parties to decide at the outset of the transaction to subject all the component contracts to one law, but that such an approach might be one option for the parties to select in the appropriate circumstances.

78. The Working Group considered both the utility and the content of the definition in paragraph 1 of the expression "private international law". One view was that the definition was unnecessary since it was a widely understood term of art and that it injected an abstract or theoretical element into the paragraph. It was also suggested that the present definition was too narrow relative to the established understanding of the term. In response, it was stated that there would be readers who would be unfamiliar with the expression and that therefore the definition would be useful. The Working Group did not subscribe to a suggestion that the reference should be made simply to "law", thereby obviating the need for a definition. It was decided to retain use of the term "private international law", since it was a widely known term and, in view of the objections that had been raised, to delete the definition.

79. It was suggested that the focus of the chapter, as described in paragraph 3, should be expanded so as to encompass contractual arrangements entered into between a party to a countertrade agreement and a third party engaging the third party to purchase or supply goods within the framework of the countertrade transaction, since some of the discussion in the chapter might be relevant to such contractual arrangements.

80. Consideration was given to the manner in which paragraph 6 treated the question of the applicability of the United Nations Sales Convention to countertrade agreements. It was suggested that the legal guide should recognize that, if the countertrade agreement was enforceable as a sales contract because it contained all the essential terms of a supply contract, the Convention would apply. Additional clarity might be achieved by referring to the substance of the provisions of the Convention concerning its scope of application. It was said that any uncertainty that remained as to the applicability of the Sales Convention had to do with countertrade agreements that did not contain all the essential terms of a supply contract. Questions were also raised as to the necessity of characterizing countertrade agreements as "pre-contractual", since a countertrade agreement might be enforceable as a contract.

B. Choice of applicable law

81. It was proposed that mention should be made of designating an international convention, such as the United Nations Sales Convention, as the applicable law, as well as non-legislative rules formulated by international organizations. It was generally felt that the right of parties from States that were not parties to a convention to designate that convention as the applicable law should be recognized. To this end, reference might be made to article 1(1)(b) of the United Nations Sales Convention, which provided for the application of the Convention by parties from States in which the Convention was not in force. At the same time the legal guide might point out that a convention that was in force in a State formed part of the law of that State.

82. The view was expressed that, in order to emphasize the advisability of choosing an applicable law, paragraph 8 should refer to the difficulties sometimes encountered in applying criteria applied by rules of private international law to determine the applicable law.

83. The Working Group noted that in some jurisdictions the choice of the law of a third country, in the absence of a link between the transaction and the State whose law had been selected, might not be upheld on the ground that there was no connection with the selected jurisdiction (sometimes referred to as the "nexus rule"). The view was expressed that the legal guide should point out to parties selecting the law of a third country that they should include a clause to the effect that the nexus rule should not be applied to their choice-of-law clause. It was pointed out that such clauses would not necessarily be upheld in all legal systems and it was suggested that paragraphs 12 and 13 should indicate that the likelihood that such clauses would be upheld would be greater in arbitration proceedings.

C. Choosing more than one national legal system to govern countertrade agreement and supply contracts

84. No changes were suggested to section C.

D. Mandatory legal rules of public nature

85. No changes were suggested to section D.

XV. SETTLEMENT OF DISPUTES
(A/CN.9/WG.IV/WP.51/Add.6)

A. General remarks

86. It was proposed that paragraph 5 should be expanded to encompass contractual arrangements between the parties to the countertrade agreement and third parties engaging those third parties to act as purchasers or suppliers of countertrade goods. A view was expressed that consideration might be given to strengthening the recommendation made in the third sentence that all of the supply contracts as well as the contractual agreement should be subject to one dispute settlement clause.

87. It was observed that the draft chapter did not contain a warning that special circumstances and difficulties with respect to dispute settlement might result when one of the contract parties is a State or an entity of a

State. Reasons adduced for not addressing such issues included that a State, when it engaged in commercial activities, normally was regarded as having waived its sovereign immunity for the purposes of legal disputes arising out of those activities and that a discussion of the question was beyond the scope of the legal guide. It was further suggested that recommending the inclusion of contractual clauses on waiver of sovereign immunity might be interpreted as suggesting that in the absence of such contractual clauses, there was no waiver of sovereign immunity by a State engaging in commercial activities. The prevailing view was that the involvement of States as contracting parties had important implications for dispute settlement and that it would be useful for the legal guide to make a brief mention of the existence of the problem and the need for parties to investigate dispute settlement aspects in such cases. It was suggested that reference might be made, for example, to the restrictions applicable to participation in arbitration by the governmental entities of some States. It was also suggested that reference should be made to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965).

B. Negotiation

88. The view was expressed that it was not immediately clear from the title of section B whether it referred to the negotiation of contractual terms at the outset of the transaction or to negotiation to settle a dispute. It was suggested that the difficulty might be solved, without altering the substance of section B, by modifying the title to read "amicable settlement" or "consultations". However, recalling that the present formulation was based on the UNCITRAL Legal Guide on Drawing Up Contracts for the Construction of Industrial Works, the Working Group hesitated to modify the title of section B since to do so might inadvertently suggest that some substantive elements had been introduced. The Working Group also noted that the use of the term "negotiation" raised problems in only some language versions. It was further noted that understanding of the meaning of the title of section B might be enhanced by a more elaborate introduction in the general remarks of the concept of negotiation as a dispute settlement mechanism.

C. Conciliation

89. It was suggested that reference should be made to the possibility of commencing conciliation proceedings even after the commencement of arbitral or judicial dispute settlement proceedings.

D. Arbitration

90. It was suggested that the differences in the remedies that were available from arbitration, as opposed to judicial dispute settlement, should be added to the list of factors to be considered in deciding whether to select arbitration as a dispute settlement mechanism.

E. Judicial proceedings

91. No changes were suggested to section E.

F. Multi-contract and multi-party dispute settlement

92. No changes were suggested to section F.

DRAFT ILLUSTRATIVE PROVISIONS
(A/CN.9/WG.IV//WP.51/Add.7*)

93. The Working Group noted that the Commission had not made a definitive decision as to whether the legal guide should contain illustrative contract provisions (see A/45/17, annex I, para. 6) and therefore the Working Group engaged in a discussion on the utility of illustrative provisions in the legal guide. Reservations were expressed as to the appropriateness of attempting to illustrate the discussion in the legal guide by suggesting contract formulations. It was pointed out that an illustrative provision could have undesirable consequences if it was not in harmony with other contract provisions. Furthermore, the fact that an illustrative provision was contained in a publication of the United Nations might be perceived as an endorsement of the provision. In addition, the parties might include the text of an illustrative provision in their countertrade agreement without completing properly the missing elements. While the proponents of the reservations recognized that an appropriate warning would be included in chapter I (Introduction to Legal Guide) (paragraph 4 of A/CN.9/WG.IV/WP.51/Add.7*), they pointed out that a reader might not read the introductory chapter before using an illustrative provision. It was therefore suggested that, if illustrative provisions were to be included in the legal guide, in each illustrative provision a reference should be made to the relevant explanation in the introductory chapter.

94. The prevailing view was that the legal guide should include a limited number of illustrative provisions. Such provisions usefully complemented the discussion in the legal guide. Support was expressed for the selection of the issues in the legal guide to be covered by illustrative provisions.

Draft chapter V, "Type, quality and quantity of goods"

Footnote to paragraph 13

95. No changes were suggested to the illustrative provision.

Draft chapter VI, "Pricing of goods"

Footnote to paragraph 37

96. It was suggested to include in the illustrative provision, and in the accompanying text, a warning that the clause might not operate in the intended way if the exchange rate of the currency of payment and the reference currency was subject to administrative regulations.

Draft chapter VIII, "Participation of third parties"

Footnote to paragraph 10

97. The Working Group requested the Secretariat to revise the four illustrative provisions so as to ensure that the various scenarios for the involvement of a third-party purchaser discussed in the legal guide were illustrated.

Draft chapter XIII, "Failure to complete countertrade transaction"

98. No changes to the illustrative provisions were suggested.

Draft chapter XIV, "Choice of law"

Footnotes to paragraph 20, second and fourth sentences

99. It was suggested that an illustrative provision should be added to cover the situation in which the parties agreed to settle the question of the law applicable to the various component contracts of a countertrade transaction by a single clause in the countertrade agreement. Such an approach might be used, in particular, when the countertrade agreement was concluded prior to the conclusion of the supply contracts in the two directions.

100. It was suggested that the illustrative provisions for chapter XIV should be expanded so as to reflect the discussion by the Working Group on the choice by the parties of international conventions and of non-legislative rules (see para. 81 above). As to the reference to international conventions, it was suggested that language illustrating the choice of an international convention, including the selection of the United Nations Sales Convention, could be added, either by expanding the existing illustrative provision or by including an additional provision.

Draft chapter XV, "Settlement of disputes"

Footnotes to paragraphs 12 and 28

101. It was suggested that the illustrative provisions should be broadened so as to indicate that a number of different conciliation and arbitration rules existed. Merely modifying the text of the relevant paragraphs in the legal guide to indicate that different rules were available was not considered sufficient if the illustrative provisions were not also modified.

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